A

GHAZALI RAHMAN

v.

MAJLIS PERBANDARAN BATU PAHAT

B

HIGH COURT MALAYA, MUAR
LAU BEE LAN J
[COURT NO: 25-46-2005]
27 APRIL 2007

C ***ADMINISTRATIVE LAW:*** *Remedies - Judicial review - Certiorari - Application to quash decision of Majlis Perbandaran Batu Pahat to terminate services of applicant - Letter of termination - Whether of legal effect - Whether the respondent was not a 'local authority' within the meaning prescribed - Whether there was a failure of the respondent to*
D *comply with the statutory regulation which required the calling for a full report from the Head of Department and for the Local Authority to consider the said full report - Whether the applicant was terminated and was not dismissed - Whether there was premature retirement*

E This application for judicial review filed by the applicant was, *inter alia*, for an order of *certiorari* to quash the decision of the Majlis Perbandaran Batu Pahat made under s. 44 of the Johore Local Authorities Officers (Conduct and Discipline) General Order 1988 to terminate the services of the applicant as Penolong Pegawai
F Perancang Bandar dan Desa, Majlis Perbandaran Batu Pahat, Johor. It was the applicant's contention that the letter of termination was of no legal effect. The issues that arose were (a) whether the respondent was not a 'local authority' within the meaning prescribed in the schedule to the General Order 44 (G.O
G 44); (b) whether there was a failure of the respondent to comply with the statutory regulation under G.O 44(1) and (2) which required the calling for a full report from the Head of Department and for the Local Authority to consider the said full report; (c) whether the applicant was terminated and was not dismissed and
H (d) whether there was premature retirement.

Held (dismissing applicant's application):

(1) At the material time when the letter of employment and the letter of termination were issued, the employer was 'Majlis
I Perbandaran Batu Pahat', a 'local authority' specified in the schedule to the G.O. The argument of the applicant that the action of the respondent was *ultra vires* G.O 44 of the GP was devoid of merit. (para 9)

(2) In the absence of any evidence that Majlis Perbandaran Batu Pahat had called for a report from the appellant's Head of Department under para.(1) of G.O 44, there was no necessity for a consideration by them of such a report under para (2) of the same; however Majlis Perbandaran Batu Pahat had to be satisfied under para.(3) of G.O 44 that it was desirable in the public interest to terminate the service of the appellant on a date specified by them, which in this case was 29 August 2005, after having regard to the terms of the said paragraph. (para 15)

(3) The appellant was given one months' salary *in lieu* of notice in accordance with para. 2(d) of the letter of employment. There is a distinction to be made between termination and dismissal of service. Therefore, there was no necessity for the appellant to be availed of an opportunity to be heard nor was there a need for any disciplinary proceeding under the G.O to be carried out before the respondent decided to terminate the service of the applicant in the public interest. (para 17)

(4) The applicant's contention that there was premature retirement could not be sustained for the reason held by the Federal Court in *Balakrishnan.* Under the G.O, G.O 44 comes under Part V and not under the heading of 'Miscellaneous' but nevertheless it was on a stand alone basis and bore the same 'non obstante' clause; thus the principle enunciated in *Balakrishnan* was equally applicable to the present case. (para 18)

(5) For the foregoing reasons, the contentions of the applicant was found to be without merit. (para 19)

Case(s) referred to:

Abdul Rauf Alip v. Suruhanjaya Pasukan Polis & Anor [2003] 1 CLJ 1 CA ***(refd)***

Ang Beng Teik v. Pan Global Textile Bhd Penang [1996] 4 CLJ 313 CA ***(refd)***

Balakrishnan v. Ketua Pengarah Perkhidmatan Awam Malaysia and the Government of Malaysia [1981] 2 MLJ 259 ***(foll)***

Fadzil Mohamed Noor v. Universiti Teknologi Malaysia [1981] CLJ 85; [1981] CLJ (Rep) 53 FC ***(dist)***

Gnanasundram v. Public Services Commission [1996] 1 LNS 219 ***(refd)***

Government of Malaysia v. Lionel [1974] MLJ 3 ***(refd)***

Quek Chek Yen v. Majlis Daerah Kulai [1986] 1 LNS 103 ***(refd)***

Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 CLJ 619 CA ***(dist)***
S Veerasingam v. Kerajaan Malaysia & Anor [2004] 3 MLJ 357 CA ***(foll)***
S Veerasingham v. Keretapi Tanah Melayu Bhd & Ors (No 2) [2002] 6 CLJ 168 HC ***(foll)***
Zakiah Ishak v. Majlis Daerah Hulu Selangor [2005] 4 CLJ 77 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 81
Johore Local Authorities Officers (Conduct and Discipline) General Order 1988, s. 44
Local Government Act 1976, s. 44

For the applicant - Fong Teng Fook; M/s Yusuf Khan & Fong
For the respondent - Mary Jesmal Periera; M/s Teh Poh Teik & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Lau Bee Lan J:

Application For Judicial Review (encl. 1)

[1] This application for judicial review filed by the applicant, Ghazali bin Rahman (leave having been granted), is *inter alia*, for an order:

(a) of *certiorari* to quash the decision of the Majlis Perbandaran Batu Pahat dated 29 August 2005 made under s. 44 of the Johore Local Authorities Officers (Conduct and Discipline) General Order 1988 to terminate the services of the applicant as Penolong Pegawai Perancang Bandar dan Desa, Majlis Perbandaran Batu Pahat, Johor; and/or

(b) to declare that the said termination is null and void and that the applicant is still in the service of the respondent, without any loss of status, emoluments and other rights and benefits applicable to the said office.

[2] The salient facts of the case as can be gleaned from the various affidavits filed on behalf of the applicant and respondent (3 in support and 4 in opposing) are the following. The applicant was employed by the respondent, Majlis Perbandaran Batu Pahat on 2 April 2001 as Penolong Pegawai Perancang Bandar dan

Desa (J29) *vide* letter of employment dated 7 March 2001 (exh. G-1). He was placed on probation for a period of one to three years and was made subject to the Johore Local Authorities Officer (Conduct and Discipline) General Orders 1988 ("the G.O"). His probation was extended twice ie from 2 April 2004 until 2 April 2005 and thereafter from 2 April 2005 till 2 April 2006 (exh AA-1). Throughout this period of employment no disciplinary action under the G.O was taken against him. On 26 August 2005 at about 7.58am, when he went to work at the respondent's office, he discovered the Central Processing Unit (CPU) Workstation which he alleged to be allocated to him and under his charge for purposes of carrying out duties as the Penolong Pegawai Perancang Bandar dan Desa was missing from his desk and he informed his Head of Department Pn. Norashikin bte Mohd Yasin; the applicant alleged that she did not take any positive action; he then informed the Secretary of the respondent of the said loss and was told not to fuss over it or to lodge a report.

However the applicant nevertheless lodged a police report, Batu Pahat Police Report No. 668/05 on the same day, exh. G2. He was on leave from 29 August 2005 till 2 September 2005, and on 30 August 2005, having heard through a friend that he had been issued with a letter of termination by the respondent, contacted the process server and he was given the said letter of termination dated 29 August 2005, exh. G3. *Vide* exh. G3 the applicant was informed "Mesyuarat Khas Bil. 1/2005 Majlis Perbandaran Batu Pahat yang bersidang pada 29 Ogos 2005 telah membuat keputusan untuk menamatkan perkhidmatan tuan demi kepentingan awam mengikut s. 44, Akta Kerajaan Tempatan, 1976 Perintah-Perintah Am Pegawai Pihak Berkuasa Tempatan Johor (Kelakuan dan Tatatertib) 1988. 2. Oleh itu perkhidmatan tuan ditamatkan mulai 1 September 2005 dan dibayar sebulan gaji sebagai menggantikan sebulan notis. Bersama-sama ini disertakan cek bernombor BIMB 037187 berjumlah RM1,586.48 bersamaan dengan sebulan gaji". The said letter was signed by one Hj. Mohd Shafiee bin Hashim, the Yang Dipertua, Majlis Perbandaran Batu Pahat.

[3] There is a point of observation which I wish to make. In the letter of termination, exh. G3, "Seksyen 44" was used. It is patently clear that by virtue of the reference to "kepentingan awam" and Perintah-Perintah Am Pegawai Pihak Berkuasa

Tempatan Johor (Kelakuan dan Tatatertib) 1988", "Seksyen 44" for all intents and purposes refer to G.O 44 of the said G.O. and not s. 44 of the Local Government Act.

[4] It is the applicant's contention that the letter of termination, exh G3 is of no legal effect on primarily 3 grounds:

(1) illegality ie Respondent acted without and/or in excess of it jurisdiction in error of the law and/or in abuse of its power.

(2) irrationally ie decision to terminate is so outrageous in defiance of logic or of accepted moral standards that no tribunal similarly circumstanced and which has applied its mind to the question to be decided could arrive at such decision.

(3) procedural impropriety ie manner in which the decision to terminate-premature retirement without proffering any reason is unfair or without just cause or with *mala fide* and/or tainted with official bias.

[5] First, I shall deal with the issue of illegality. On 19 March 2007 when the application was heard, the thrust of the applicant's contention is that respondent is not a "local authority" within the meaning prescribed in the Schedule to the G.O which was listed as follows (the material parts):

SCHEDULE

...

Majlis Daerah Batu Pahat Barat

Majlis Daerah Batu Pahat Timor.

(see J.P.U 25 dated 28.5.1988)

The reason being the letter of employment exh. G1 and the letter of termination exh. G3 were issued by the Yang Dipertua of Majlis Perbandaran Batu Pahat whereas the "local authority" prescribed in the Schedule are the two local authorities described above. Thus, it was the applicant's contention that his employer is "Majlis Daerah Batu Pahat" and not "Majlis Perbandaran Batu Pahat" and since it is not a "local authority" in accordance with the Schedule, the respondent had acted *ultra vires* G.O 44 of the G.O to effect the termination of the services of the applicant. In support learned counsel for the applicant, Mr. T.F Fong cited *Fadzil Mohamed Noor v. Universiti Teknologi Malaysia* [1981] CLJ (Rep) 85; [1981] CLJ (Rep) 53.

[6] *Vide* a letter dated 2 April 2007 to the court, learned counsel for the respondent, Ms M.J Pereira, drew the court's attention to Gazette Notification J.P.U 11 dated 16 April 2002, wherein the status of Majlis Daerah Batu Pahat Barat was changed to "Majlis Perbandaran Batu Pahat" (Batu Pahat Municipal Council in the English rendition) and the change was to take effect from 1 January 2001; further learned counsel for the respondent also cited s. 81 of the Evidence Act 1950 on presumption of the genuiness of gazettes.

[7] Learned counsel for the applicant did not respond to this point directly save to say:

> In view thereof we wish to point out that even if the status of Batu Pahat Barat District Council had since 1.1.2001 been changed to Batu Pahat Municipal Council, this does not detract from the fact that General Order 44 stipulates in its sub-paragraph (1) that a full report from the Head of Department in which the Officer is or has been serving is to be called for and General **Order 44(2)** compels the Local Authority to **consider** that said **full report and be satisfied** that having regard to the conditions of the services, the usefulness of the Officer thereto, the work and conduct of the Officer and all other circumstances of the case, it is desirable in the public interest to terminate his service.
>
> The said letter of termination (Exhibit "G-3" in Enclosure 2) merely invokes "Seksyen 44, Akta Kerajaan Tempatan, 1976 Perintah-Perintah Am Pegawai Pihak Berkuasa Tempatan (Kelakuan dan Tatatertib) 1988" pursuant to a "special meeting" held on 29.8.2005, i.e. three (3) days after the Applicant lodged the police report (Exhibit "G-2"), in obvious **non-compliance** of General Order 44(1) and 44(2).
>
> Apparently the machinery of General Order 44 has been abused and the Respondent's action constitutes *mala fide* in the circumstances adumbrated.

[8] The contention of the applicant in this letter will be addressed hereafter. Apart from the Gazette Notification J.P.U 11/02 highlighted by the learned counsel for the applicant, for completeness, (based on the court's own research), *vide* Gazette Notitication J.P.U 28/02 dated 17 June 2002 the name of "Batu Pahat Timur District Council" was changed to "Yong Peng District Council" and such notification was deemed to come into force on 1 January 2001.

[9] Since it is now evident that at the material time when the letter of employment exh. G1 (dated 7 March 2001) and the letter of termination, exh. G3 (dated 29 August 2005) were issued, the employer was "Majlis Perbandaran Batu Pahat" a "local authority" specified in the Schedule to the G.O, I find the argument of the applicant that the action of the respondent was *ultra vires* G.O 44 of the G.O is devoid of merit. In this regard the authority of *Fadzil Mohamed Noor (supra)* on the issue of *ultra vires* is irrelevant.

[10] I now turn to the other two arguments of the decision to terminate was irrational and flawed by procedural impropriety. Basically under these two heads of argument the applicant contended that there is a failure of the respondent to comply with the statutory regulation under G.O 44(1) and (2) which the respondent submitted required the calling for a full report from the Head of Department in which the officer is or has been serving and for the Local Authority to consider the said full report and be satisfied it is desirable in the public interest to terminate his service after having regard to the conditions of the service, the usefulness of the officer, the work and conduct of the officer and all other circumstances of the case.

[11] The applicant also submitted that the reasons given by the respondent were afterthoughts particularly when the respondent terminated the applicant three (3) days after he lodged a police report. On the otherhand, learned counsel for the respondent submitted it was within the powers of the respondent to terminate the service of the appellant in accordance with s. 44 of "Akta Kerajaan Tempatan 1976 Perintah-Perintah Am Pegawai Pihak Berkuasa Tempatan Johor (Kelakuan Dan Tatatertib) 1988" (Local Government Act 1976 Johore Local Authorities Officers (Conduct And Discipline) General Orders 1988 in the English rendition) (it should read as G.O 44 and not s. 44 of the Local Government Act for the reason which I have pointed out earlier) after taking into account the following matters:

> (a) Setelah meneliti laporan daripada Ketua Jabatan Responden dan berpuashati bahawa dengan mengambil kira syarat-syarat perkhidmatan beliau, kegunaan pegawai tersebut, kerja dan tingkahlaku beliau dan keadaan kes tersebut, adalah perlu dari kepentingan awam; (s. 44(2));

(b) Walaupun ada langkah tatatertib telah atau sedang dijalankan, Responden masih berhak menamatkan perkhidmatan Responden (s. 44(2)) *(sic)*;

(c) Responden berhak untuk tidak memberi peluang kepada Pemohon hak untuk didengar; (s. 44(2)) *(sic)*;

(d) Penamatan tersebut tidak dikira sebagai pembuangan kerja bagi tujuan peruntukkan Perkara 135(2) Perlembagaan Persekutuan; (s. 44(2)) *(sic)*.

[12] The respondent disputed the claim of the applicant that the reasons for termination were afterthoughts stating that there were valid grounds:

(a) Pemohon masih tidak disahkan jawatan walaupun tempoh percubaan beliau telah dilanjutkan sebanyak 2 kali. Ianya adalah kerana beliau tidak memenuhi syarat yang terkandung dalam surat tawaran tersebut (perenggan 6 Afidavit Responden 1)

(b) Penurunan dan/atau kemerosotan prestasi kerja Responden dari masa ke semasa walaupun pada awalnya beliau mempunyai prestasi baik (perenggan 14(a) Afidavit Responden No. 1) contohnya pada tahun 2004 markah keseluruhan bagi prestasinya Pemohon berjumlah 46% sedangkan sebelumnya adalah lebih tinggi. (Perenggan 10 Afidavit Responden 3 dan ekshibit "NMY-3")

(c) Sikap dan disiplin Pemohon yang mana beliau bersikap keakuan (ego), hanya mengikut arahan pegawai tertentu sahaja dan sering hadir lewat ke pejabat (perenggan 14(b) dan (c) Afidavit Responden 1)

(d) Terdapat aduan orang ramai berhubung tingkahlaku pemohon (perenggan 14(d) Afidavit Responden 1 dan Ekshibit "NMY-1").

[13] As to the interpretation to be accorded to G.O 44, I draw support from the judgment of Abdoolcader J (as he then was speaking on behalf of the Federal Court) in *Balakrishnan v. Ketua Pengarah Perkhidmatan Awam Malaysia and the Government of Malaysia* [1981] 2 MLJ 259. In *Balakrishnan (supra)* the appellant, an Enforcement Officer in the Road Transport Department, had been charged with attempted corruption but was acquitted. Subsequently the Public Services Commission wrote to the appellant stating that from a report from the Director-General of Road Transport he appeared to be in control of pecuniary

resources and property disproportionate to his official emoluments and known private means and requiring him to submit an explanation. The appellant submitted his explanation and was told that the explanation had been considered. Subsequently the first respondent, the Director of Public Services, informed the appellant that the Government had decided to terminate his service in the public interest under s. 10(d) of the Pension Ordinance and G.O 44. He brought an action in the High Court for a declaration that the termination of his service in the public interest was void, inoperative and of no effect which was dismissed. The appellant appealed and before the Federal Court, one of his grounds in the words of His Lordship Abdoolcader J (as he then was) was "as action was initiated under G.O 8, then the procedure under G.O 27 and 30 should apply and have been observed and the failure to do so has resulted in denying the appellant natural justice by compliance with the requisite procedure laid down in G.O 30 and that in the circumstances G.O 44 could not apply or be resorted to and the purported termination there under was accordingly an exercise of bad faith and an abuse of power". In considering this ground, His Lordship, Abdoolcader J (as he then was) opined (at p. 262 E-I) right; p. 263 A-D left) as follows:

> We advert to the terms of GO 44(1). There is a non obstante clause we have observed and that paragraph refers to representations to or a finding by the 2nd respondent that it is desirable that an officer should be required to retire from the public service in the public interest or on grounds which cannot suitably be dealt with by the procedure laid down in the GO and goes on to provide that the 2nd respondent may call for a full report from the head of department in which the officer is serving. Paragraph (2) of GO 44 was not invoked by the 2nd respondent in these proceedings and it did not have to in its discretion and we now turn to paragraph (3) thereof. Mr. Sivalingam further submits that the termination of the service of an officer in the public interest under GO 44(3) can only be made effective if in accordance with the terms of that paragraph the 2nd respondent has considered the report, which clearly refers to a report that may be called for by the 2nd respondent under paragraph (1) of that GO. He says that there is no evidence of any such report having been called for the purposes of paragraph (1) of GO 44 and in these circumstances in view of the provisions of paragraph (3) there could be no termination of the appellant's service.

GO 44(1) does not make the calling of a report from the head of department mandatory and imperative but only directory and discretionary, unlike the requirements therein as to the contents of any such report called for which are obligatory, and even paragraph (2) of GO 44 regarding communication to the officer concerned of the complaints against him is discretionary and only where the 2nd respondent considers that the report requires further clarification. *As the report under paragraph (1) is not mandatory, paragraph (3) of GO 44 must on a proper, reasonable, harmonious and purposive construction read to mean* ***that consideration of the report only takes place when such a report has in fact been called for but not otherwise*** *but the 2nd respondent has to be satisfied under that paragraph that it is desirable in the public interest to terminate the service of the officer having regard to the conditions of the service, the usefulness of the officer thereto, the work and conduct of the officer and all the other circumstances of the case.* The logical sequence to the argument for the appellant, demonstrating its fallacy, would be that if in fact representations have been made to the 2nd respondent in a report from a head of department in respect of an officer which makes it desirable for his retirement from the public service in the public interest, then before such termination can be effected under GO 44(3), it will still be necessary for the 2nd respondent to call for another report all over again under GO 44(1), as GO 44(3) refers, as we have pointed out, to a report called for under paragraph (1) of GO 44. It would only be consonant with common sense to conclude that in the event of any such precedent representations it will be open to the 2nd respondent to proceed under GO 44(3) without calling for any further report under paragraph (1) of. that GO. In any event, however, there would appear to be a report from the Director General of Road Transport which is referred to in the letter of May 22, 1971 from the Secretary to the Public Services Commission to the appellant. (emphasis added)

[14] The letter of termination merely cited "Section 44" (which I have alluded to earlier) was meant to refer to G.O 44 and did not specify whether Majlis Perbandaran Batu Pahat was terminating the appellant's service pursuant to G.O 44(1) and (2) or G.O 44(3). G.O 44(3) refers to termination of service of an officer by the local authority on recommendation of the "Disciplinary Authority" which by virtue of s. 2 of the GO means "a committee relating to disciplinary control which is presided by the president and the secretary of the Local Authority as member who shall be secretary of the committee". Based on the evidence before the court no such recommendation was made by such a Disciplinary

Authority against the appellant. Thus the only logical conclusion which can be drawn is that Majlis Perbandaran Batu Pahat terminated the service of the appellant pursuant to G.O 44(1) and (2).

[15] In *Balakrishnan*'s case. It is to be noted that G.O 44(1) and (3) of the Public Officers (Conduct and Discipline) (General Order, Chapter D) Regulations 1969 (now repealed) is in *pari materia* with G.O 44(1) and (2) respectively of the G.O save for the limb regarding an opportunity to reply to the complaints of the Government in para. 2 of G.O 44 which is irrelevant in the context of the instant case due to the absence of such a provision; and the reference to "Government" in the former refers to "Local Authority" in the latter. It can be seen too from the abovesaid dicta, the argument of the learned counsel for the applicant in this present case is not unlike that of the appellant's counsel in *Balakrishnan (supra)* in that in order for termination of service of an officer in the public interest to be effective, a report from the head of department is called for and has been considered by the local authority in the manner stipulated in G.O 44(2).

From the aforesaid dicta regarding G.O 44 it can be gleaned:

(i) G.O 44 does not make the calling of a report from the head of department mandatory and imperative but only directory and discretionary;

(ii) the consideration of the report in para. 2 of G.O 44 only takes place when such a report has in fact been called for but not otherwise; and

(iii) the local authority (as prescribed under the Schedule to the G.O) has to be satisfied under para. 2 that it is desirable in the public interest to terminate the service of the officer having regard to the conditions of the service, the usefulness of the officer thereto, the work and conduct of the officer and all the other circumstances of the case. In the context of the instant case, I am of the view that in the absence of any evidence that Majlis Perbandaran Batu Pahat had called for a report from the appellant's Head of Department under para. (1) of G.O 44, there is no necessity for a consideration by them of such a report under para. (2) of the same; however Majlis Perbandaran Batu Pahat has to be satisfied under para. (3) of

G.O 44 that it is desirable in the public interest to terminate the service of the appellant on a date specified by them, which in this case was 29 August 2005, after having regard to the terms of the said paragraph. A

[16] It was submitted on behalf of the respondent that the appellant was not entitled to question the motive for his termination citing *Balakrishnan (supra)* and *Zakiah Ishak v. Majlis Daerah Hulu Selangor* [2005] 4 CLJ 77. As opined by the Federal Court in *Balakrishnan (supra)* on the question of public interest, the matter was one for the 2nd respondent (the Government of Malaysia) to determine (see p. 263 para E left). Further, in *Zakiah Ishak*'s case *(supra)* at p. 81 h-i the Court of Appeal after approving the case of *Gnanasundram v. Public Services Commission* [1996] 1 LNS 219 and following *Quek Chek Yen v. Majlis Daerah Kulai* [1986] 1 LNS 103 held "The premise upon which the respondent decided to terminate her contract is strictly a matter for the respondent. **It is not open to the appellant to question the motive of the respondent.** In this case it is clear that the appellant's service with the respondent was terminated ..." (emphasis added). In *Zakiah Ishak*'s case *(supra)* the plaintiff appealed against the dismissal of her claim for a declaration that the termination of her services or dismissal was null and void, arrears of salary and damages. The plaintiff was employed as a treasurer with the defendant on a one-year contract commencing 16 July 1997; on 12 September 1997. The defendant sought to terminate the plaintiff's contract of employment by giving her a three month notice under cl. 9 of the said contract; thereafter before the expiry of the said period, following a disciplinary board meeting the defendant terminated the plaintiff's employment by giving her 24 hours notice with one month's salary. In this connection the case of *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis & 2 Ors.* [1995] 1 CLJ 619 (cited by learned counsel for the applicant) on procedural unfairness has no relevance as it is the finding of this court there has been no contravention of G.O 44(1) and (2). B C D E F G H

[17] Another point of consideration as submitted by the learned counsel for the respondent is the applicant was terminated and was not dismissed. I find there is merit in this argument and it is of significance. It is undisputed that the appellant was given one (1) month's salary *in lieu* of notice in accordance with para 2(d) of the letter of employment which reads "Bahawa dalam tempoh I

percubaan itu maka tuan/puan boleh diberhentikan kerja dengan diberi notis 3 bulan jika tuan/puan telah berkhidmat lebih dari satu tahun dan 1 bulan notis jika tuan/puan telah berkhidmat kurang dari satu tahun atau sebagai gantinya dibayar sebulan gaji bersih dengan tidak payah memberi apa-apa sebab". It is trite law that there is a distinction to be made between termination and dismissal of service. Therefore, there is no necessity for the appellant to be availed of an opportunity to be heard nor is there a need for any disciplinary proceeding under the G.O to be carried out before the respondent decided to terminate the service of the applicant in the public interest (see cases cited by the learned counsel for the respondent namely *Government of Malaysia v. Lionel* [1974] MLJ 3, *Balakrishnan (supra), S Veerasingham v. Keretapi Tanah Melayu Bhd & Ors (No. 2)* [2002] 6 CLJ 168, *Abdul Rauf Alip v. Suruhanjaya Pasukan Polis & Anor* [2003] 1 CLJ 1, *Zakiah Ishak (supra)*) and *Gnanasundram (supra)*. In my view this point is reinforced by para. 4 of G.O 44 which provides:

> Notwithstanding anything in these General Orders and any other law to the contrary, in terminating the service of any officer in the public interest under this General Order, such officer may not be given any opportunity of being heard and an officer whose service has been terminated in the public interest under this General Order shall not, for the purpose of Article 135(2) of the Federal Constitution, be regarded as having been dismissed regardless of whether such termination of the service of the officer involved an element of punishment and/or connected, either wholly or partly, with his conduct in relation to his office which the Local Authority regards as unsatisfactory or blame-worthy.

In my view G.O 44(4) and the aforesaid authorities demolished the argument of the applicant's counsel that the termination of his service involved a punitive element and he had urged upon the court to accord to the applicant his right to livelihood as guaranteed under the Federal Constitution and to bolster the argument, the case of *Ang Beng Teik v. Pan Global Textile Bhd. Penang* [1996] 4 CLJ 313 at p. 314 Held [1] was cited.

[18] As for the contention of the applicant that there is premature retirement, I am of the view it cannot be sustained for the reason held by the Federal Court in *Balakrishnan (supra)* at p. 262 F to G (left) that "GO 44 comes under Part IV of the GO under the heading "Miscellaneous" and opens with the significant non obstante clause "Notwithstanding these General

Orders, ...," thus making it quite separate and distinct from the preceding three Parts of the GO dealing with conduct, disciplinary procedure and general provisions pertaining to disciplinary punishments. GO 44 goes therefore beyond and is additional to what precedes it ...". I am mindful that under the G.O, G.O 44 comes under Part V and not under the heading of "Miscellaneous" but nevertheless it is on a stand alone basis and bears the same "non obstante" clause; thus I am of the view that the principle enunciated in *Balakrishnan (supra)* is equally applicable to the present case. In fact the case of *S Veerasingam v. Kerajaan Malaysia & Anor* [2004] 3 CLJ 338 cited on behalf of the applicant supported this position as the Court of Appeal had at p. 366 in fact followed *Balakrishnan (supra)* by referring to the said portion of the judgment and stated "a termination order under GO 44 is a distinct and separate matter altogether".

[19] For the foregoing reasons, I find the contentions of the applicant to be without merit. The application of the applicant is dismissed with cost.